**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**

**FCA US LLC**
**Respondent**

**and** **CASES 07-CA-219895**
**07-CA-221914**

**LOCAL 723, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO**

**Charging Party**

# RESPONDENT FCA US LLC'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

**Respectfully Submitted,**

**Darlene Haas Awada, Esq.**
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Date: April 19, 2019

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## STATEMENT OF ISSUES:

1. Is the Correct Description of the Bargaining Unit contained in Paragraph 13 of Schedule A of the collective bargaining agreement between FCA US LLC and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as set forth in Respondent's Amended Answer to the Consolidated Complaint?

2. Under the totality of the circumstances, did Respondent make a good faith effort to timely provide the requested team leader interview forms to the Union?

3. Did Respondent provide all relevant information that existed in response to the April 17th request for information?

   A. Did Respondent fully respond to the Charging Party's request for taxi pulls by providing all it was able to retrieve in response to the Charging Party's April 17, 2018 request for information?

   B. Did the Charging Party fail to establish the relevance to Respondent of its April 17th request for two weeks of production numbers for the entire Dundee Engine Plant?

   C. Did the Charging Party fail to establish to Respondent a factual and logical basis for needing non-bargaining unit disciplines, thus failing to establish relevance?

4. Did Respondent have legitimate and substantial confidentiality concerns related to an ongoing FMLA fraud investigation which outweighed the requester's immediate need for Chris Wilson's incomplete statement, and did Respondent offer to bargain an accommodation with regard to its confidentiality concerns?

5. Should ***Piedmont Gardens,*** 362 NLRB No. 139 (2015), be overruled, and should the Board rule that witness statements are exempt from disclosure in response to a Union's information request?

6. Did the GC and the Charging Party fail to establish an on-going need for the outstanding information?

## SUMMARY OF ARGUMENT[1,2]

This matter involves the bargaining unit described in Paragraph 13 of Schedule "A" of the current collective bargaining agreement between Respondent and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.

There are three groups of information requests at issue in this case: 1) interview forms from the February 20th information request regarding the grievance over Robert Watts, Jr.'s removal from his Team Leader position, which were provided, but for which Counsel for the General Counsel ("the GC") alleges unreasonable delay, 2) the information request submitted in conjunction with the grievance(s) over Kelli Newkirt's disciplinary layoff, three items of which the GC alleges were necessary and relevant to the Charging Party's collective bargaining duties and were not provided: "taxi pulls," production numbers for all of Dundee Engine Plant, and information regarding non-bargaining unit disciplines, and 3) Chris Wilson's incomplete statement taken during an investigation into potential FMLA fraud, which was provided, and for which the GC alleges unreasonable delay.

Concerning the team leader interview forms, these were joint Union-management committee documents. The evidence established that Labor Relations Supervisor Nick Weber, Jr. believed he was providing the requested information as part of a larger production regarding Watts, and when asked about the forms in a follow-up from the Charging Party, Mr. Weber misunderstood, believing that the Charging Party was referencing two specific interview forms included in the joint committee's packet. Once management understood that Mr. Weber had inadvertently made an error in failing to provide four pages, this was immediately corrected.

[1] Respondent moves to correct the transcript in this respect: The transcript identifies Clifford Terry, Jr. as "Esq.," however, this designation is incorrect and Respondent moves for this designation to be stricken.
[2] Tr." refers to the transcript of the administrative hearing; "JX," "GCX," and "RX" refer to Joint Exhibit, Counsel for the General Counsel's exhibits and Respondent's exhibits, respectively.

Under the totality of the circumstances, the Company made a good faith effort to provide the needed information in response to the Union's request, and this did not constitute unreasonable delay.

Regarding the Kelli Newkirt request, the record established that Respondent provided all relevant information that existed. With regard to the taxi pulls, as an initial matter, this item was not alleged in any of the charges, and should be dismissed from a due process standpoint. Moreover, the evidence established that all information that existed in response to this item was fully provided. The second item in this request—production numbers[3] for the entire Dundee Engine Plant facility for two weeks—is not presumptively relevant, and, despite Respondent repeatedly stating that it failed to see the relevance of this item, the Union failed to articulate relevance in response (RX5, RX6). Absent a demonstration of relevance, Respondent was not obligated to provide the information. The third item—non-bargaining unit discipline information—is also not presumptively relevant. Again, although Respondent repeatedly stated to the Charging Party that it failed to see the relevance, the Charging Party declined to articulate to Respondent a factual and logical basis for requiring the information, thus failing to establish relevance. In addition, the record establishes that, although the Standards of Conduct apply all employees, a separate department investigates and administers discipline for bargaining unit employees than for non-bargaining unit employees, and bargaining unit employees are governed by a progressive discipline system that non-bargaining unit employees do not enjoy. Under these circumstances, the factual basis also fails.

Regarding Chris Wilson's incomplete statement taken pursuant to the FMLA fraud investigation, the record establishes that Respondent followed ***Piedmont Gardens***, and evaluated

[3] Testimony established that production numbers are the number of engines produced for all of Dundee Engine Plant on a given day on each shift. (Tr. 186-187)

the specific circumstances of the case where the employee would not complete his initial interview, and management knew he would need to be brought back in for further questioning. At the time, management had also received reports of sharing of statements in the Union office with bargaining unit employees. Under these circumstances, Respondent believed it had confidentiality concerns that outweighed the Charging Party's immediate need for the statement, so it offered to bargain an accommodation to satisfy its concerns, even making a proposal to provide the statement at the conclusion of the investigation. The Charging Party rebuffed Respondent's offer. Even so, Respondent exercised good faith and provided the statement at the conclusion of the investigation as the confidentiality concerns were no longer an issue. Notwithstanding Respondent's compliance with ***Piedmont Gardens***, this case illustrates why returning to a blanket rule against disclosure is well-advised, and Respondent asks the Board to do so.

Finally, to the point of the GC's requested remedy, all underlying issues and grievances that prompted these requests have been resolved, rendering the information requests moot. Neither the GC nor the Charging Party have established the continuing relevance of any of the outstanding items of information. Accordingly, although Respondent does not believe it has violated the Act, should it be found that Respondent unlawfully failed to provide any item of information, well-established Board law holds that Respondent should not be ordered to provide these moot items.

## ARGUMENT

### I. The Correct Bargaining Unit Description is Contained in Paragraph 13 of Schedule "A"

The undisputed testimony established at trial that the correct description of the bargaining unit is as follows, and as set forth in Schedule "A" of the current collective bargaining agreement

between Respondent and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO:

> All full-time and regular part-time production and maintenance employees employed by Dundee Engine Plant (formerly known as Global Engine Manufacturing Alliance) at its facility located in Dundee, Michigan but excluding office clerical employees, engineers, guards and supervisors as defined in the Act.

## II. Under the totality of the circumstances, Respondent made a good faith effort to timely provide the requested team leader interview forms to the Union

The first information request at issue was submitted by second shift committeeman Mark Willingham to Respondent on February 20, 2018, after Robert Watts, Jr. was removed from his team leader position after an investigation by the Joint Team Leader Selection Committee (JTLSC), consisting of both Union and management representatives. (GCX14, Tr. 208-209) With this information request, the GC alleges Respondent unreasonably delayed in providing four pages of information as part of its larger response. The interviews and the interview forms were completed by the JTLSC and the requested documents were joint documents. (Tr. 159, 214; GCX14) In Mr. Willingham's follow-up, he asked about interview forms as instructed by the JTLSC handbook included in the committee's original packet (Tr. 211; GCX14, p. 45-46, GCX6) What occurred was inadvertent error and misunderstanding that was rectified.

In determining whether an employer has unreasonably delayed in responding to an information request, the Board considers the totality of the pertinent circumstances surrounding the incident. ***West Penn Power Co.***, 339 NLRB 585, 587 (2003). Here, Respondent supplied most of the information, believed it was providing all of the information, and misunderstood the Charging Party's follow-up question. In addition, because the Union was also present during the interviews at issue and the documents were joint documents, the Charging Party had access to and could have provided more information to Respondent during the time period that it did not

have the information, but did not do so. See ***Day Automotive Group***, 348 NLRB 1257, 1262-63 (2006) (finding no violation where the employer had reason to believe it had satisfied the union's request for information and the union did not say the information provided was insufficient or requested additional information).

The missing forms were provided immediately once the error was understood on May 24, 2018—well before the grievances filed pertaining to Mr. Watts' removal from his team leader position were resolved on November 29, 2018. [4] (Tr. 154; GCX6; RX14; RX15; RX17) Thus, once Respondent understood that information was not provided, Respondent immediately provided the information, and the Charging Party had within its possession these four pages of inadvertently omitted information for six months before the grievance which led to the filing of the information request was ultimately resolved. Accord ***LTD Ceramics***, 341 NLRB 86, 87–88 (2004) (finding that the employer did not refuse to provide information in violation of the Act, in part because the employer provided some information in response to the Union's request, and any misunderstanding about what additional information the Union still wanted could have been resolved by further communication between the parties); ***Reebie Storage & Moving Co.***, 313 NLRB 510, 513 (1993) (same, where the employer responded in good faith to the Union's requests, and did nothing to foreclose or discourage the Union from pursuing its interests more actively), enf. denied on other grounds, 44 F.3d 605 (7th Cir. 1995).

In sum, the evidence established that in response to this request, Respondent believed it was providing all responsive information. As soon as Respondent understood its omission, it immediately rectified the mistake. Under the totality of the circumstances, this did not constitute unreasonable delay.

[4] Two of the four interview forms were helpful to Respondent's position that Mr. Watts should be removed, so Respondent had no logical motive for deliberately withholding these documents. (GCX6; Tr. 214-216)

## III. Respondent provided all relevant information that existed in response to the April 17th request for information

Following the issuance of a three day disciplinary layoff to bargaining unit employee Kelli Newkirt (RX2), on April 17, 2018, Mark Willingham submitted a request for information to numerous members of management, including to Labor Relations Supervisor Nick Weber, Jr. (RX4). He also copied Union officials, including Shop Chairmain Lorenzo Jamison, Sr. With this information request, the GC alleges that information was not provided, however, this information was either fully provided (the taxi pulls) or not demonstrated to be relevant (production numbers and information regarding non-bargaining unit disciplines).

### A. Respondent fully responded to the Charging Party's request for taxi pulls by providing all it was able to retrieve in response to the Charging Party's April 17, 2018 request for information

The April 17th information request includes a request for taxi pulls, which are delivery requests. This item is not alleged in any of the charges (GCX1), and should thus be dismissed from a due process standpoint. Substantively, the evidence established that, because the information no longer existed locally, the plant had Corporate IT retrieve all existing information and provided what existed to the Union. (RX8, RX9) The Union has been told they have all existing information. (RX9, Tr. 197-198) Although Mark Willingham gave vague testimony that he had a conversation with Nick Weber, Jr., "sometime" after May 14, 2018 (Tr. 98), his testimony is not credible. He did not even try to give an approximate time frame, and when asked where the conversation occurred, he stated "typically I go see Nick. I go to his office," showing he was not recalling a specific memory. (Tr. 99) In contrast, Mr. Weber credibly denied that he stated that he could get the information. (Tr. 197-198) Respondent made diligent efforts to retrieve the information it could retrieve in response to the request (RX8, RX9), and

there is no credible evidence that any evidence has been withheld. This portion of the request has been fully satisfied.

### B. The Charging Party failed to establish the relevance to Respondent of its April 17th request for two weeks of production numbers for the entire Dundee Engine Plant

The April 17th request for information included a request for two weeks of production numbers. (RX4) Testimony established that production numbers are the number of engines produced for all of Dundee Engine Plant on a given day on each shift. (Tr. 186-187) Other than give general boilerplate statements that the information was needed to "investigate a grievance or grievances" and to "bargain intelligently and or [sic] to adjust or resolve grievances," the Charging Party provided no articulation of relevance to Respondent, despite Respondent stating that it did not see the relevance of this item repeatedly. (RX5, RX6) The Board has held that such general assertions are insufficient to establish relevance.

Section 8(a)(5) of the Act requires an employer to bargain in good faith with the representative of its employees. An employer's duty to bargain in good faith includes a duty to provide to a union, upon request, relevant information necessary for the union's proper performance of its statutory duties as collective-bargaining representative. ***Detroit Edison Co. v. NLRB***, 440 U.S. 301 (1979); ***Disneyland Park***, 350 NLRB 1256, 1257 (2007). An employer's obligation is triggered by a request for relevant information. ***IronTiger Logistics, Inc.***, 366 NLRB No. 2, slip op. at 1 (Jan. 9, 2018). Where the requested information concerns bargaining unit employees or their terms and conditions of employment, the Board has generally presumed that the information is relevant and producible unless the employer rebuts the presumption of relevance. ***Disneyland Park***, 350 NLRB at 1257; ***IronTiger Logistics***, 366 NLRB No. 2, slip op. at 1. Where no such presumption exists, the Union bears the burden to establish relevance.

***Shoppers Food Warehouse Corp.***, 315 NLRB 258, 259 (1994).

This is not presumptively relevant information: the information sought—production numbers for the entire plant for two weeks—is not specific to the bargaining unit or the terms and conditions of employment of the bargaining unit. Although Respondent repeatedly told the Union that it did not see the relevance of this item, the Union failed to articulate relevance to Respondent in response. The Board has held that the general type of boilerplate language stated by the Charging Party in its initial request is insufficient to establish relevance, noting that the "theory of relevance must be reasonably specific; general avowals of relevance such as 'to bargain intelligently' and similar boilerplate is insufficient." ***SuperValu Stores, Inc.***, 279 NLRB 22, 25 (1986), affirmed mem., 815 F.2d 712 (8th Cir. 1987); see also ***F.A. Bartlett Tree Expert Co.***, 316 NLRB 1312, 1313 (1995). Moreover, the Board has held that an employer has no duty to provide information to a union where the union has stated that it needs information to process a grievance, and the union has not demonstrated there is actual relevance to the grievance, even in the case of presumptively relevant information. See ***United Parcel Service***, 362 NLRB 160, 161-163 (2015). The Charging Party failed to establish relevance to Respondent with respect to this item.

### C. The Charging Party failed to establish <u>to Respondent</u> a factual <u>and</u> logical basis for needing non-bargaining unit disciplines, thus failing to establish relevance

The Consolidated Complaint alleges that Respondent unlawfully failed to provide disciplinary information pertaining to non-bargaining unit employees (GCX1). The Charging Party requested, on April 17, 2018, that Respondent provide it with a list of all individuals disciplined for violations of Standard of Conduct #3, 5, 6, 11, and 14, and disciplines served for

violations of Standard of Conduct #3, 5, 6, and 11, in the past two years, for hourly and salaried employees. (RX4). The Charging Party incorrectly numbered the items in its initial request. (RX4) Respondent, in its reply, combined the response of the listing of employees and disciplines served and sequentially numbered its response, providing the responsive disciplinary information pertaining to bargaining unit employees, but stating that Respondent did not see the relevance with regard to non-bargaining employees. (RX5) In reply, the Charging Party stated that the Standards of Conduct applied to all FCA employees, recited boilerplate language that it needed it "in order to intelligently resolve or process future grievances," and stated what it wanted. (RX6) This is an insufficient articulation of relevance.

As explained above, an employer's statutory obligation under Section 8(a)(5) is triggered by a request for relevant information. ***IronTiger Logistics, Inc.***, 366 NLRB No. 2, slip op. at 1. Where the requested information concerns bargaining unit employees themselves or their terms and conditions of employment, the Board has generally presumed that the information is relevant and producible unless the employer rebuts the presumption of relevance. ***Disneyland Park***, 350 NLRB at 1257; ***IronTiger Logistics***, 366 NLRB No. 2, slip op. at 1. Where no such presumption exists, the Union bears the burden to establish relevance. ***Shoppers Food Warehouse Corp.***, 315 NLRB at 259.

Also as set forth above, the Board has held that the general type of boilerplate language recited by the Charging Party that it needed the information to "intelligently resolve or process future grievances" is insufficient to establish relevance, noting that the "theory of relevance must be reasonably specific; general avowals of relevance such as 'to bargain intelligently' and similar boilerplate is insufficient." ***SuperValu Stores, Inc.***, 279 NLRB at 25; see also ***F.A. Bartlett Tree Expert Co.***, 316 NLRB at 1313. Moreover, the Board has held that an employer has no duty to

provide information to a union where the union has stated that it needs information to process a grievance, and the union has not demonstrated there is actual relevance to the grievance, even in the case of presumptively relevant information. See ***United Parcel Service***, 362 NLRB at 161-163.

Specific to information pertaining to employees outside of the bargaining unit, despite repeatedly questioning relevance to the Charging Party, the Charging Party still failed to establish a factual and logical basis for needing the information to Respondent. ***United States Postal Service***, 310 NLRB 391, 392 (1993); ***Tegna, Inc.***, 367 NLRB No. 71, slip op. at 2 (2019). The Board has consistently held that, in order to establish the relevance of non-bargaining unit disciplines to a union's collective bargaining duties, a union must demonstrate a reasonable belief in its relevance supported by objective evidence. ***United States Testing***, 324 NLRB 854, 859 (1997) enfd. 160 F.3d 14 (D.C. Cir. 1998); ***Reiss Viking***, 312 NLRB 622, 625 (1993). Not only must the union demonstrate this reasonable belief in its relevance supported by objective evidence, it must also communicate this to the employer (emphasis added). ***Disneyland Park***, 350 NLRB 1256, 1257-1258 (2007). The Union communicated no objective evidence in support of its theory of relevance to Respondent. Compare with ***E.I. DuPont De Nemours***, 366 NLRB No. 178, slip op. at 4 (2018) (The union there provided an explanation to the employer that it needed information regarding non-bargaining safety violations in order to evaluate how five specifically identified supervisors were treated in comparison with the grievant because employees had observed them committing serious safety violations, and the union was aware that the supervisors were not terminated as the grievant was, despite being subject to the same safety rules as bargaining unit employees. The union in ***E.I. Du Pont*** additionally explained to the employer that it needed the information pursuant to the parties' past practice of presenting

comparison cases at arbitration).

In the instant case, Mr. Willingham articulated some theory of disparate treatment at trial in response to the GC's questioning (Tr. 79-80). However, the record shows he did not communicate **to Respondent** that he needed the non-supervisory disciplines for disparate treatment purposes or in relation to specific supervisors he might have seen violate Standards of Conduct and evade discipline. (Tr. 137-138) His testimony regarding disparate treatment was simply a post-hoc justification advanced at trial. Under these circumstances, relevance was not established.

Moreover, the unrefuted testimony established that discipline was assessed under completely different and separate schematics for bargaining unit employees than for non-bargaining employees at Dundee Engine Plant. Bargaining unit employees have a negotiated progressive discipline process. (RX3) Salaried employees do not have any progressive discipline policy. (Tr. 183-184) Discipline is investigated and assessed by the Labor Department at Dundee Engine Plant for bargaining unit employees, which has no role in investigating or assessing salaried employee' disciplines. (Tr. 13-184) The GC and Charging Party's claim that the applicability of a rule or policy is enough to make data on all employees subject to that rule relevant to bargaining unit employees without more, and under such differing circumstances, is without merit. Compare with ***Pfizer, Inc.***, 268 NLRB 916, 918 (1984) (relevance of non-bargaining unit disciplines established where same policy of considering work records as a determining factor in assessing disciplines and the same progressive discipline applied to both the bargaining unit employees and the non-bargaining unit employees about whom the disputed information was sought). Accordingly, the GC and the Charging Party have not established a factual or a logical basis for the non-supervisory disciplines.

Under the circumstances present here, where the Charging Party failed to establish the relevance of the data concerning non-bargaining unit disciplines, Respondent did not violate Section 8(a)(5) of the Act by failing to produce the disciplines in response to the request.

## IV. Respondent had legitimate and substantial confidentiality concerns related to an ongoing FMLA fraud investigation which outweighed the requester's need for Chris Wilson's incomplete statement, and Respondent offered to bargain an accommodation with regard to its confidentiality concerns

On June 25, 2018, Mark Willingham asked for a copy of Chris Wilson's statement, which Mr. Wilson would not complete during the taking of the statement, at the completion of his interview during an investigation into potential FMLA fraud. (Tr. 138, 141-142; GCX10; RX18) The employee refused to answer all questions during the first attempt to take his statement, and management had heard reports from a bargaining unit employee around that time that statements had been circulated to employees in the Union office (Tr. 245). In response to Mr. Willingham's request for the statement, Respondent evaluated the circumstances and the request, and found there were substantial and legitimate confidentiality considerations that were implicated. Consistent with ***American Baptist Homes of the West d/b/a Piedmont Gardens***, 362 NLRB No. 139 (2015), Respondent informed the Union that it had confidentiality concerns and offered to bargain an accommodation with the Union that satisfied its confidentiality concerns. To that end, Respondent offered to provide the statement to the Union at the conclusion of the investigation. The Union did not enter into discussions with Respondent or offer a counteroffer, but claimed that this was contrary to past practice. However, ***Piedmont Gardens*** requires a Respondent to do an analysis of each particular case, rather than to have a blanket rule, so that is what Respondent does, and that is what Respondent did here.

Oddly, the GC appears to argue, contrary to existing law, that Respondent *should* have a blanket rule with regard to investigative statements. To that end, the GC offered into evidence

statements and testimony pertaining to other investigations, suggesting, it seemed, that Respondent should have a "practice" with regard to whether to disclose statements, and that by conducting its analysis regarding Mr. Wilson's statement, Respondent deviated from a blanket practice. This is simply an inaccurate understanding of law. As the ***Piedmont*** Board noted, "[w]hether [] information withheld is sensitive or confidential will be assessed based on the specific facts in each case**."** ***Piedmont Gardens,*** at 1139-1140, quoting ***Northern Indiana Public Service Co.***, 347 NLRB 210, 211 (2006) (emphasis added).

The relevant inquiry here pertains to the facts surrounding Mr. Wilson's statement. As the record established, Mr. Wilson did not complete his interview when he was called in for questioning regarding potential FMLA fraud. (Tr. 138). Accordingly, the Company had concerns about releasing the incomplete statement when it was necessary for the Company to call him in again, and for Mr. Wilson to be asked additional questions (giving him time to review the prior questions). (Tr. 139, 244; GCX10) In addition, Human Resources Manager Bob Daragon testified that a bargaining unit employee had shared around that time information about the Union sharing documents with employees in the union office. (Tr. 244-245) Under these circumstances, Respondent determined its confidentiality concerns outweighed the Union's immediate need for the statement and offered to bargain an accommodation, even proposing what it saw as a solution which would protect its concerns pertaining to the investigation, yet infringing upon the Union's representational duties as little as necessary. Thus, it proposed providing the statement at the conclusion of the investigation (when discipline, if any, would be imposed, which the Union could grieve).[5]

What occurred when statements from other interviews were requested depended on the unique set of circumstances evaluated (under ***Piedmont Gardens***) when those requests were

[5] Mr. Wilson was not issued any discipline as a result of this investigation. (Tr. 222)

made. Clearly, for example, an employee giving a statement to substantiate why his medical condition prevented him from meeting the FMLA call-in window (Timothy Rectenwal, David Vickers, GCX11), does not have the confidentiality considerations present in a fraud investigation. (Tr. 254-256)

## V. Should *Piedmont Gardens,* 362 NLRB No. 139 (2015), be overruled, and should the Board rule that witness statements are exempt from disclosure in response to a Union's information request

Notwithstanding Respondent's compliance with ***Piedmont Gardens,*** 362 NLRB No. 139 (2015), Respondent does not believe this is the correct standard to apply with regard to disclosure of witness statements. Indeed, the arguments the GC and the Charging Party have made in the instant case illustrate why a return to a blanket rule against disclosure is well-advised. For example, in arguing that the Respondent identify its specific confidentiality concerns, the Charging Party is asking Respondent to alert it to what it knows to be the precise vulnerabilities to the integrity of its investigation which could potentially render its precautions meaningless. Moreover, if any case where disclosure is deemed appropriate because confidentiality considerations are evaluated not to outweigh the Union's need for the information will be relied upon as a "past practice," contrary to existing law, then the GC is inviting a "past practice" of non-disclosure. Accordingly, we are asking that ***Piedmont Gardens*** be overturned, and the Board return to a standard exempting witness statements from disclosure in response to Union requests for information.

## VI. The GC and the Charging Party failed to establish an on-going need for the outstanding information

The GC failed to establish that the Charging Party has any on-going need for any of the outstanding information set forth in the Consolidated Complaint. ***Borgess Medical Center***, 342

NLRB 1105, 1106 (2004). The grievance which the GC and the Charging Party argue relate to Kelli Newkirt's discipline (R-10), and another grievance which neither argued related to the information request, but pertains to the same incident (R-11), were both withdrawn without the ability to be reinstated.[6] (RX10, RX11, RX12, JX1 p.34, Section 30(b)).

Moreover, following withdrawal of the grievances, Mr. Weber attempted to assess whether there was any continuing relevance for the information the Union claimed was related to the Newkirt grievances.[7] On October 9, he sent Union Shop Chairman Lorenzo Jamison, Sr., with whom the settlement was reached, and who Mr. Willingham copied on the Newkirt request for information (RX4, RX5, RX6, RX7, RX8, RX9) and follow-up correspondence, asking if the information was still needed. Mr. Jamison replied that he would assume Mr. Willingham still wanted it if he never received it. Mr. Weber replied that if was any arguable relevance now that the grievance was resolved, he didn't see it. (RX25) Mr. Weber did not receive a response.[8]

Thus, even in the event the outstanding information is deemed relevant (production numbers and non-bargaining unit disciplines) or could somehow be produced even though the

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[6] The grievances regarding Ms. Newkirt's discipline were resolved on September 25, 2018, and withdrawn without precedent.(Tr. 156, 236-237; GC5). Under the contract, at this point, they cannot be reinstated (J1, Section 30(b) on p. 34) Mr. Willingham asserted that the designation "WWP" on the grievance documents means withdrawn without prejudice, however, he was not the union official who withdrew the grievances—Lorenzo Jamison, Sr. was. Although Mr. Jamison testified, he did not address this issue and he was not recalled on rebuttal. Under the circumstances, an inference that his testimony would not have been consistent with Mr. Willingham's is appropriate. ***Martin Luther King, Sr. Nursing Center***, 231 NLRB 15, n.1 (1977) ("where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him"). Further, even if the grievances were withdrawn without prejudice, they are past the point in time in which they could be reinstated under Section 30(b) of the collective bargaining agreement. If a grievance is withdrawn without prejudice, it can only be reinstated within three months from the date of withdrawal. There is no contractual mechanism for these grievances to be reinstated regardless of the form of the withdrawal.

[7] The other information—the Watts interview forms and the Wilson statement—were provided and the only issue alleged in the Complaint with regard to these items is unreasonable delay.

[8] In January 2019, in preparation for the instant trial, Mr. Weber emailed Mr. Willingham and asked what information he still needed. Rather than working with Mr. Weber and identifying what the Union still deemed necessary, Mr. Willingham responded, even after he was informed that the underlying matters were resolved, that Mr. Weber should review the original RFI and provide any information the Company didn't provide. (RX20)

record fails to establish it exists (taxi pulls), the information request is moot. The grievance(s) to which the Charging Party claimed the information related are withdrawn with no ability to be reinstated. Neither the CG nor the Charging Party established or even argued any current need for the information—the record is devoid of evidence of any continuing need. Under these circumstances, the Board has held that a respondent not be ordered to produce the information as the need for it has ceased to exist. ***Id.*** See also ***Westinghouse Electric Corp.***, 304 NLRB 703, n.1, 709 (1991) (no affirmative order to produce requested information in light of judge's finding that only demonstrated relevance was to a concluded arbitration that the arbitrator was without authority to reopen).

## VII. Conclusion

Based upon the entire record in this case and upon the arguments recited above, it is respectfully requested that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 19th of April, 2019.

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**CERTIFICATE OF SERVICE**

I certify that on the 19th day of April, 2019, I electronically served copies of **RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** on the following parties of record:

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